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CASE NOTES

EVIDENCE–ADMISSION OF GRUESOME AND SHOCKING PHOTOGRAPHS OF VICTIM AT MURDER TRIAL HELD REVERSIBLE ERROR

During the course of an argument which erupted subsequent to a discussion of their financial problems, defendant struck his wife, and beat her with a hammer. Their small daughter, hearing the commotion, attempted to intercede whereupon defendant proceeded to beat them both unconscious. Then the defendant went upstairs to the second floor, got a hunting knife and returned to the basement whereupon he slashed his wife and daughter to death. Defendant was convicted in the trial court of murder in the first degree[1] and sentenced to death. On appeal, the Supreme Court of Indiana reversed and remanded the cause for a new trial on the grounds that it was prejudicial error to admit into evidence gruesome and shocking photographs,[2] one showing the hands and instruments of a surgeon inside the chest of deceased during the autopsy, the other showing additional incisions and stitches on the body of deceased made by the surgeon in performing the autopsy. *Kiefer v. State*, 153 N.E. 2d 899 (Ind., 1958).

Thus, the Indiana court followed a growing trend in the reversal of convictions obtained in homicide cases where gruesome and shocking photographs of the victim were admitted into evidence at the trial level.[3]

There is ample authority for the general proposition that where photographs of a victim, or parts of a victim, are otherwise properly admitted and have a reasonable tendency to prove or disprove some material fact in issue, or shed light upon some material inquiry, they are admissible in evidence even though they portray a gruesome spectacle and may tend to arouse passion and resentment against the defendant in the mind of the jury; such admission into evidence is a matter of discretion for the trial court and the determination will not be overruled except in a clear case of

[1] The indictment was for the death of the wife only.

[2] The State introduced a number of other photographs, whose admission into evidence was upheld, that portrayed the nude, slashed body of defendant's wife lying in the basement at the scene of the occurrence. Also introduced and admitted as a part of the *res gestae* was a photograph of the body of the little girl as it appeared in the basement at the scene; on it could be seen the large knife wounds about the face and body.

[3] State v. Bischert, 131 Mont. 152, 308 P.2d 969 (1957); People v. Jackson, 9 Ill.2d 484, 138 N.E.2d 528 (1956); People v. Burns, 109 Cal.2d 524, 241 P.2d 308 (1952); Craft v. Commonwealth, 312 Ky. 700, 229 S.W.2d 465 (1950); McKee v. State, 33 Ala. App. 171, 31 So.2d 656 (1947).

abuse.[4] Further, photographs are not necessarily rendered inadmissible because the facts thereby shown are cumulative or have been admitted by the defendant.[5]

The most common reasons for the introduction of such photographs into evidence are to show the nature and location of the injury,[6] to indicate the position of the body,[7] to refute the defendant's plea of self-defense,[8] and to identify or aid in the identification of the victim.[9] The significant test, then, for the admission of a photograph as an exhibit is its relevancy. If it tends to prove a material fact or is offered within the frame of reference of a contested issue it is admissible, notwithstanding any grisly or shocking aspects which it may also contain.[10] Where the accused claimed he struck the victim a light blow on the head to prevent his partner from shooting him, a photograph of the victim's skull, from which the skin and flesh had been removed and which showed a large, jagged hole and numerous radiating cracks, was admitted as indicative of the force with which the blow was struck.[11]

[4] State v. Nyland, 47 Wash.2d 240, 287 P.2d 345 (1955); State v. DeZeler, 230 Minn. 39, 41 N.W. 313 (1950); Hancock v. State, 209 Miss. 523, 47 So.2d 833 (1950); Hampton v. State, 148 Neb. 547, 28 N.W.2d 322 (1947); Potts v. People, 114 Colo. 253, 158 P.2d 739 (1945); Rowe v. State, 243 Ala. 618, 11 So.2d 749 (1943); Russell v. State, 196 Ga. 275, 26 S.E.2d 528 (1943); Turrell v. State, 221 Ind. 662, 51 N.E.2d 359 (1943); Commonwealth v. Sheppard, 313 Mass. 590, 48 N.E.2d 630 (1943); Fitzgerald v. Commonwealth, 290 Ky. 825, 162 S.W.2d 202 (1942); State v. Johnson, 198 La. 195, 3 So.2d 556 (1941); Mardorff v. State, 143 Fla. 64, 196 So. 625 (1940); Nicholas v. State, 182 Ark. 309, 31 S.W.2d 527 (1930); People v. Gomez, 209 Cal. 296, 286 Pac. 998 (1930).

[5] Wilson v. State, 31 Ala. App. 21, 11 So.2d 563 (1942); Hawkins v. State, 219 Ind. 116, 37 N.E.2d 79 (1941); State v. Nelson, 162 Ore. 430, 92 P.2d 182 (1939); Commonwealth v. Yaeger, 329 Pa. 81, 196 A. 827 (1938); People v. Burkhart, 211 Cal. 726, 297 Pac. 11 (1931); Blazka v. State, 105 Neb. 13, 178 N.W. 832 (1920). "[A] colorless admission by the opponent may sometimes have the effect of depriving the party of the legitimate moral force of his evidence; furthermore, a judicial admission may be cleverly made with grudging limitations or evasions or insinuations (especially in criminal cases), so as to be technically but practically a waiver of proof. . . ." 9 Wigmore on Evidence § 2591 (3rd Ed., 1948).

[6] Commonwealth v. Earnest, 342 Pa. 544, 21 A.2d 38 (1941); State v. Burrell, 112 N.J.L. 330, 170 A. 843 (1934); Young v. State, 182 Ariz. 298, 299 P. 682 (1931); Nicholas v. State, 182 Ark. 309, 31 S.W.2d 527 (1930); People v. Coleman, 50 Cal. App.2d 592, 123 P.2d 557 (1942).

[7] Robinson v. United States, 63 F.2d 147 (D.D.C., 1933); People v. Jersky, 377 Ill. 261, 36 N.E.2d 347 (1941); People v. Smith, 15 Cal.2d 640, 104 P.2d 510 (1940); State v. Lantzer, 55 Wyo. 230, 99 P.2d 73 (1940); State v. Hamilton, 340 Mo. 768, 102 S.W.2d 642 (1937).

[8] People v. Becker, 300 Mich. 562, 2 N.W.2d 503 (1942); Waters v. Commonwealth, 276 Ky. 315, 124 S.W.2d 97 (1939); Commonwealth v. Peronace, 328 Pa. 86, 195 A. 57 (1937).

[9] Commonwealth v. DiStasio, 294 Mass. 273, 1 N.E.2d 189 (1936); State v. Miller, 52 R. I. 440, 161 A. 222 (1932); People v. Northcott, 45 Cal. App. 706, 189 P. 704 (1920).

[10] Potts v. People, 114 Colo. 253, 158 P.2d 739 (1945).

[11] Hawkins v. State, 219 Ind. 116, 37 N.E.2d 79 (1941).

In the instant case a number of photographs were exhibited to the jury which depicted the victim's body at the scene of the occurrence and the wounds thereon from various angles. The reviewing court upheld the admission of these photographs as relating to material aspects of the case.[12] But when the purpose of an exhibit is to inflame the mind of the jury rather than to enlighten the jury as to any fact, it should be excluded.[13] In *Poe v. Commonwealth*,[14] the Supreme Court of Kentucky reversed and remanded a conviction of voluntary manslaughter (on other grounds). In referring to the attempted introduction of a photograph of the deceased's body, the court suggested that the prosecutor be more careful in attempting to introduce possibly inflammatory evidence unless the need for such was more clearly shown. Then, in a subsequent opinion sustaining the conviction obtained at a re-trial,[15] where the defendant had interposed the plea of self-defense and the Commonwealth introduced the photograph to refute the contention, the court upheld the admission of such evidence because of its probative value in the light of defendant's plea. It was an indication that this court possessed a refined sensitivity to the distinction between academic and material relevancy.

Other jurisdictions have weighed the probative value of the photograph against its prejudicial effect.[16] In California,[17] a conviction in a prosecution for murder was reversed on the grounds that it was prejudicial error to admit photographs showing the surgical incisions on the shaved, severed head of the victim. In *McKee v. State*,[18] the prosecution contended that the deceased died from a severe blow delivered by the defendant. As evidence of this, a photograph was introduced showing the cut-open body of the victim and the ruptured spleen. In reversing the trial court, the Supreme Court of Alabama held this photograph inadmissible because it not only showed the damaged spleen but also showed the open operation made by the autopsy surgeon and was of questionable value in solving the matter in issue:

> Where, as in this case, massive mutilation of a body is necessary to expose such injured organ, fairness to an accused demands that only so much of the surrounding dissected body area be pictured as is reasonably necessary to furnish visual aid to the jury in determining the question of facts presented.[19]

[12] Kiefer v. State, 153 N.E.2d 899 (Ind., 1958).

[13] State v. Bischert, 131 Mont. 152, 308 P.2d 969 (1957).

[14] 301 S.W.2d 900 (Ky., 1957).

[15] Poe v. Commonwealth, 314 S.W.2d 199 (Ky., 1958).

[16] People v. Burns, 109 Cal.2d 524, 241 P.2d 308 (1952); Craft v. Commonwealth, 312 Ky. 700, 229 S.W.2d 465 (1950); Commonwealth v. Simmons, 361 Pa. 391, 65 A.2d 353 (1949); State v. Morgan, 211 La. 572, 30 So.2d 434 (1947).

[17] People v. Redston, 139 Cal. App.2d 485, 293 P.2d 880 (1956).

[18] 33 Ala. App. 171, 31 So.2d 656 (1947).

[19] Ibid., at 177 and 661.

However, in a recent case[20] involving remarkably similar circumstances, the Supreme Court of New Jersey indicated an unwillingness to employ similar reasoning and decided the issue on procedural grounds. The defendant was convicted of shooting his wife. On the trial, the state introduced a photograph of the torso of the deceased which showed where incisions had been made allowing the flesh to be retracted and exposing the abdominal organs and the inner structure of the chest. The purpose of this photograph was to show the path of the bullet through the body. The supreme court held that the photograph was gruesome and sound judicial discretion dictated its exclusion, but that it was not substantially prejudicial so as to require a reversal under the plain error rule.[21] A contrary decision which seems to indicate an astute awareness on the part of the court of the psychological impact of such evidence is *People v. Jackson.*[22] There, in a prosecution for murder, defendant was convicted of stabbing the deceased in the chest. The state was permitted to introduce a photograph showing the face and neck of the deceased, taken at the hospital after the autopsy, in which the autoptic incisions were visible. In reversing and remanding the case the Supreme Court of Illinois said:

> We are unable to say that this inadmissible evidence could not have been a determining factor in the bringing in of the death penalty for this defendant.[23]

In the instant case, the state introduced sufficient photographic evidence to show the nature and location of the wounds, the condition of the body and its position at the scene of the occurrence, and all other cogent facts. There seemed to be no reason for introducing the photographs showing the surgeon's hands in the chest wound and the subsequent surgical incisions other than to inflame the jury. The court in its opinion stated its position in a very lucid manner:

> However, we do not pass upon the guilt or innocence of a defendant. Our duty is to see that he has a fair trial. Even the perpetrator of a crime as heinous as that portrayed by the evidence in this case, is entitled to a fair trial and the protection of his rights as an American citizen. It is with this thought in mind that we approach the questions presented by this appeal.[24]

[20] State v. Bucanis, 26 N.J.L. 45, 138 A.2d 739 (S. Ct., 1958).

[21] Defendant's objection in the trial court was insufficient to raise the issue of the inflammatory and prejudicial nature of the photographs; the court applied the plain error rule. N. J. Rev. Stat. (1956) 1:5-1 provides: "The court may, however, notice plain errors affecting substantial rights of the defendant, although they were not brought to the attention of the trial court. If it shall appear, after challenge interposed by the defendant in the appellate court, that the verdict was against the weight of the evidence, the judgment shall be reversed and a new trial ordered."

[22] 9 Ill.2d 484, 138 N.E.2d 528 (1956).

[23] Ibid., at 490, 531.

[24] Kiefer v. State, 153 N.E.2d 899 (Ind., 1958) at 899.

The reasoning employed by some of the courts in this area of the law is unrealistic and psychologically unsound. Where the state has in some extrinsic manner intensified or exaggerated the grisly aspects of an occurrence and attempts to introduce photographs of such conditions to the prejudice of the defendant, the growing trend is to repulse these efforts. It would appear to be the more enlightened view.

JOINT TENANCY–COMMON LAW REQUIREMENT OF FOUR UNITIES HELD NOT NECESSARY TO CREATE JOINT TENANCY IN STOCK CERTIFICATES

The decedent owned shares of stock in several corporations. In 1948 and 1950, he transferred the shares into his and defendant's name as "joint tenants with the right of survivorship and not as tenants in common." The transfer was accomplished by direct assignment executed in writing on the back of the stock certificate and signed by the decedent. Plaintiff, the decedent's widow, sought a declaratory judgment to fix ownership of these shares in her. Plaintiff contended that her husband had failed to create a joint tenancy because the common law requisites of unity of time and unity of title were not present in the transfer. The court of appeals, per Justice Finnegan, affirmed the decision of the district court holding for the defendant; and ruled that the transfer did create a valid joint tenancy, apparently basing its decision on the construction of an Illinois statute[1] and the interpretation of a prior Illinois Supreme Court decision.[2] *Petri v. Rhein*, 257 F. 2d 268 (C.A. 7th, 1958).

The issue thus raised by the instant case is whether a joint tenancy in personal property may be created without first conveying to a *strawman*[3] and then reconveying to the joint tenants.

At common law and in Illinois, a joint tenancy in personal property was recognized[4] when the unities of time and title were both present.[5] A joint tenancy by operation of law could never be created.[6] The unities were necessary so that both parties could gain equal interests at the same time. If one merely transferred part of the interest to another, it was con-

[1] Ill. Rev. Stat. (1957) c. 76.

[2] Hood v. Commonwealth Trust & Savings Bank, 376 Ill. 413, 34 N.E.2d 414 (1941).

[3] A strawman in the language of real estate brokers is a mere conduit or medium for the convenience in holding and passing title. Van Raalte v. Epstein, 202 Mo. 173, 99 S.W. 1077 (1906).

[4] Re Estate of Jirovec, 285 Ill. App. 499, 2 N.E. 354 (1936); Staples v. Berry, 110 Me. 32, 85 A. 303 (1912); Deslauriers v. Senesac, 331 Ill. 427, 163 N.E. 327 (1928); Case v. Owen, 139 Ind. 22, 38 N.E. 395 (1894); Neal v. Neal, 194 Ark. 226, 106 S.W.2d 595 (1937).

[5] Ibid. [6] Deslauriers v. Senesac, 311 Ill. 437, 163 N.E. 327 (1928).